UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PALISADE NURSING CENTER

and Case No. 22-CA-28154

SEIU 1199 NEW JERSEY
HEALTH CARE UNION

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for the General Counsel
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(Jasinski, P.C., Newark, New Jersey),
for the Respondent

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This case stems from charges in Case Nos. 22-CA-28154 filed on December 3, 2007, by SEIU 1199 New Jersey Health Care Union (1199NJ or the Union) against Palisade Nursing Center, (Palisade, the Employer or Respondent). On May 27, 2008, the Regional Director for Region 22 issued an Order Severing Cases, Amended Complaint and Notice of Hearing (the complaint) alleging that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. The complaint alleges, in essence, that since in or about October 2007, Respondent unlawfully failed to and delayed in providing information to the Union. The Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed, as relevant, in further detail below.

Based upon an amended charge filed in Case No. 22-CA-28154 filed on April 9, 2009, Counsel for the General Counsel issued a notice of motion, dated October 1, 2009, to amend the complaint to further allege that Respondent unilaterally failed and refused to make contractually required pension fund contributions, and so moved at the inception of the hearing.[1] Respondent opposed the amendment, arguing that it did not relate back to the original charge. Respondent further argued that the Union lacks standing to bring this claim and that any such allegations should have been resolved through the grievance and arbitration procedure of the underlying collective bargaining agreement between the parties. Respondent additionally denied the material allegations of the amendment to the complaint. In its post-hearing brief, Respondent further asserts that the allegations are time barred by Section 10(b) of the Act.[2]

[1] At the hearing, I reserved ruling on the motion. As discussed below, General Counsel's motion to amend the complaint is hereby granted.

[2] In its initial answer to the complaint, Respondent asserts a Section 10(b) defense generally, "to the extent [the complaint] refers to or relies upon events and circumstances

Continued

A hearing on this matter was held before me on October 1, 2009 in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a New Jersey corporation with a facility located in Guttenberg, New Jersey, is engaged in the operation of a nursing home and rehabilitation center. During the 12-month period preceding the issuance of the complaint, the Respondent derived gross revenues in excess of $100,000 and purchased goods valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Contract Negotiations and Related Requests for Information

1. Background

Respondent is one of several facilities operated by the Omni Management Corporation, (Omni), a company that manages a number of nursing homes in New Jersey including Castle Hill Health Care Center, Bristol Manor Health Care Center and Harbor View Health Care Center (hereafter Castle Hill, Bristol Manor and Harbor View).

The Union represents a unit of employees including full-time and regular part-time licensed practical nurses (LPNs) certified nurses aides (CNAs), nurses aides, orderlies, dishwashers, kitchen helpers, porters, maids, laundry workers and recreation aides employed by the Employer. The most recent collective-bargaining agreement was not a full contract, but rather a five-year memorandum of agreement (MOA) which contained modifications, primarily economic, to prior agreements. This MOA expired on July 24, 2007 (the 2002 MOA). The MOAs

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occurring beyond the limitations period. . .” Other than those allegations relating to Respondent’s alleged failure to make pension fund contributions, Respondent has failed to specify any other allegation of the complaint which it is contesting on this basis, and does not raise any such claims in its post-hearing brief. It is well settled that the party raising an affirmative defense bears the burden of proof. As Respondent has failed to specify any other allegations of the complaint to which such an affirmative defense might apply, or to cite any evidence to support the general assertions contained in its answer, I conclude that it has failed to meet its burden of proof in this regard.

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding as well as an assessment of the demeanor of the witnesses. In addition, the inherent probability of the testimony has been utilized to assess credibility. Where there is an apparent conflict in the evidence of particular relevance to my determinations herein, I have endeavored to explain the specific basis for my conclusions. Otherwise, testimony contrary to my findings below has been discredited on some occasions because it was in conflict with the credited testimony of others, otherwise incompatible with more reliable evidence or because it was inherently incredible or unworthy of belief.

for Castle Hill, Bristol Manor and Harbor View expired on the same date as well, and the bargaining for these four facilities overlapped for some time. Although this proceeding relates to Palisade only, from time to time the parties made reference to discussions at other tables, as will be described as is relevant to the issues herein.

The bargaining for a successor agreement commenced in July 2007 and continued thereafter. The last meeting addressed in the record occurred in June 2009. Throughout negotiations Respondent has been represented by its attorney David F. Jasinski, who was the lead negotiator, and consultant Mendy Gold. The primary negotiator for the Union was its secretary-treasurer, Marvin Hamilton, who was assisted by international representative Ron McCalla.[4] There was also an employee bargaining committee which attended each scheduled session. In addition, in about August 2007, the Union asked for a federal mediator. Respondent agreed to this request, and a mediator was appointed by the Federal Mediation and Conciliation Service (FMCS) to assist in the negotiations.

2. The April 2007 Request for Information, and Respondent's Initial Response

In anticipation of bargaining, on April 25, 2007, the Union's executive vice-president Clauvice Saint Hilare wrote to Palidade administrator Maria Iavoroni requesting certain information, as follows:

> *SEIU 1199 New Jersey Health Care Union requests the following information, which it needs for upcoming negotiations for a successor agreement. Please provide the information no later than May 15, 2007. At the same time, I would suggest May 22 or 24 as bargaining date.*
>
> *1. Any and all documents, including but not limited to job descriptions and performance evaluations, that describe the job duties for all bargaining unit positions;*
>
> *2. For each employee working in a bargaining unit position, such documents as will show the following:*
> - *a) Job title for each employee;*
> - *b) Date of hire;*
> - *c) Current hourly rate of pay;*
> - *d) Regular hours of work;*
> - *e) Number of overtime hours worked on a quarterly basis in 2006 and 2007;*
> - *f) Address;*
> - *g) Whether employee is a no-frills employee;*
>
> *3. Documents, including but not limited to summary plan descriptions that show all fringe benefits such as health insurance, disability, pension, profit sharing, and 401(k) benefits available to or provided to part-time and full-time employees in the bargaining unit;*
>
> *4. Any and all manuals or other documents, including documents distributed to employees, that describe any of the terms and conditions of employment for employees in the -bargaining unit;*
>
> *5. Gross annual payroll for the bargaining unit for the periods January 1, 2006*

[4] Neither Hamilton nor Gold testified in this proceeding.

through December 31, 2006 and January 1, 2007 through March 31, 2007;

6. Total cost to the Employer for each of the following benefits provided to bargaining unit employees during the periods January 1, through December 31, 2006 and January 1 through March 31, 2007: health, dental, vision, life insurance and pension;

7. Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child;

8. Names of all agencies used by the Employer to provide temporary staff;

9. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007;.

10. Copies of work schedules for each nursing unit and/or department for the months October through December, 2006, and January through March 2007;

11. OSHA injury and illness records for 2005, 2006 and 2007.

12. Any and all documents setting forth policies regarding overtime work (both voluntary and mandatory), shift differentials and/or any form of premium pay for employees in the bargaining unit;

13. Any and all documents setting forth policies regarding health and safety in the workplace;

14. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Respondent, through Jasinski, initially replied to this information request on May 31 2007. He sent the Union a list of employee names with addresses, job classifications, wage rates, dates of hire, job status and health insurance coverage. He additionally enclosed a benefits rider as well as an employee handbook.

On June 4, Saint Hilare responded to Jasinski in relevant part, as follows:

The Union has made numerous unsuccessful attempts to scheule negotiations by phone and in writing. We have received part of the info requested for Palisade, Castle Hill and Bristol Manor. The Union is available for bargaining on June 14, 19, 20 and 21, 2007. The Union suggests we start with Castle Hill. Please advise regarding your availability. The Union has no problem bargaining at the facility or at the Union's office.

As of today, we have received no response to the bargaining notice to Harborview Health Care Center and no response to the info request. A the last phone conversation, you said that you are the counsel assigned to negotiation the Harborview contract but w have received no indication in writing that you are the negotiator for this Nursing Home.

For the record, I just want you to know that the package you sent to the Union contains for Bristol Manor: Employee list with rate, social security number, date of hire and a

policy manual; for Castle Hill only a cover letter and a policy book; for Palisades: Employee list with rate, social security number, date of hire and a policy manual. In order to prepare for negotiations, the Union requests the following information:

- *An updated list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), part-time or full-time status, number of hours worked and paid since January 1 2007, and amount of vacation days, sick days, personal days and/or holidays earned but unused for the employees at Castle Hill. We did not receive any of this information in the package that you sent to the Union for Castle Hill.*

- *The gross bargaining unit payroll from January 1 2007 through June 30 2007 for Palisades, Bristol Manor and Castle Hill.*

On June 4, Jasinski sent the Union a copy of Respondent's summary description plan for its health insurance, which listed the various benefits offered to employees and set forth the costs to employees for dependent health care coverage. [5]

Thereafter, on June 22, Jasinski forwarded additional information; i.e. gross wages for January through December 2006 and January through March 2007 and the aggregate costs for health and dental and life insurance premiums for the same period of time.

3. The First Bargaining Session -- July 17, 2007

During this session, the parties articulated their goals for bargaining, and the Union asked for a full response to its prior information requests. Hamilton provided the Employer with an additional copy of Saint Hilare's April 25 letter to Iavoroni.

The parties discussed the lack of a contemporaneous fully-integrated collective-bargaining agreeement. According to McCalla's bargaining notes, the Employer agreed to produce a "full contract with all memos."

At this session, the Unon presented a complete proposal containing economic and non-econimic terms. Among other things, the Union proposed a three-year agreement with a wage increase of 21 percent over the life of the contract. At the end of the contract term minimum salaries for the CNAs and Grade 1 (dietary and housekeeping) employees would reach $11 and $10, respectively. McCalla testified that this standard was similar to the standard that the Union was seeking to establish at the other Omni facilities under negotiation at the time.

4. The Union's July 17, 2007 Information Request and Respondent's Response

On July 17, 2007, Hamilton sent the following letter to Iavoroni:

SEIU 1199 New Jersey Health Care Union requests the following information which it needs for upcoming negotiations for a sucessor agreement. Except where noted, this is its second attempt to gather this important information. Please as per the conversation of July 13,

[5] Single health insurance coverage was provided at no cost to the employees. The benefits rider listed the additional costs to employees if they wished to include family members under the Employer's plan.

2007 with the chief negotiator for Bristol Manor Mr. David Jasinski, the Union request is as follows:

1. For each employee working in a bargaining unit position, such documents as will show the following:

a. Number of overtime hours worked on a quarterly basis in 2006 and 2007
b. Whether employee is a no-frills employee
c. Regular hours of work (averagae for one year)

2. Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child. Additional (sic) the Unio requests all information the employer holds concerning family status of each employee in the categories referenced above whether or not the employeee has opted to include family members for health insurance purposes. Family status informtaion was requested during the July 13, 2007 bargaining meeting.

3. Names of all agencies used by the Employer to provide temporary staff.

4. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billied and job title for eacah agency employee provided to the Employer during the periodsJanuary 1, 2006 through March 31, 2007.
5. Copies of work schedules for each nursing unit and/or department for the months October through December 2006 and January through March 2007.

6. OSHA injury and illness records for 2005. 2006 and 2007.

7. Any and all document setting forth policies regarding overtime work (both voluntary and mandaatory), shift differentials and/or any form of premium pay for employees in the bargaining unit.

8. Any and all documents setting forth policies regarding health and safety in the workplace.

9. Complete copies of cost reports submitted,including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

On July 30, 2007, Jasinski wrote to Hamilton enclosing a corrected employee list which showed average hours for a two-week period during the prior six months. In this letter, Jasinski stated: "This completes the Union's information request."

5. The Union's August 8, 2007 Response

On August 8, 2007, Saint Hilare sent a letter to Respondent suggesting bargaining dates for the Omni facilities during the month of August. The letter advised the Employer that the Union had contacted the New Jersey State Board of Mediation to secure a mediator, noted that the Union had not received a management proposal at any of the Omni tables and requested that management put forward proposals at the next bargaining session for each of the facilities. In this letter, Saint Hilare further asserted:

The Union expects responses to our outstanding information request items at the next

bargaining session and will have a response to your information request dated July 27, 2007.[6]

We are in receipt of your Bristol Manor document compiling the various memorandums of agreement into one document. Needless to say we have many questions concerning this document. You agreed to supply a similar compilation document for each of the other Omni facilities and to supply copies of the MOAs that you used to produce each compilation document. Please inform us of the date you expect to complete this work.[7]

6. The Union Continues to Request Information during Bargaining

The parties held negotiations in August, September and October of 2007. At these meetings the Union requested that the Employer respond to its information requests generally. According to McCalla, the Union also requested per-employee costs to the Employer for health insurance premiums. Jasinski told the Union that they were already in possession of the aggregate figures and that if they divided that number by the number of employees, they could figure out the per-employee costs themselves. The Union responded that the number of employees who apparently were not receiving insurance, although entitled to do so, made such a computation difficult. As McCalla testified, the Union was incredulous that this information was not readily available. McCalla testified that the Union was seeking this information because the Union was trying to improve the insurance benefits offered to employees and felt that an understanding of the costs of the Employer's plan would enable it to determine whether the Union's plan would be a viable alternative.

The issue of no-frills employees was raised during the September meeting. No-frills employees are those who agree to forego certain contractual benefits for an increased wage rate. Under the 2002 MOA, the Employer was limited to offering such terms to 10 employees and was proposing to increase that limit to 20. The employee rosters which had been given to the Union by the Employer showed a number of employees, significantly in excess of 10, who were listed as not having any health insurance. The Union asked to go through the employee roster to identify the no-frills employees and to otherwise determine why employees might not have health insurance. The Union questioned whether the employee list was an accurate representation of the unit and who would need to be covered by insurance. There is no evidence that the parties actually did go through the employee list, as the Union requested.

The Union also raised the issue of whether employees from outside agencies were being used at the facility. The Union told the Employer that it was receiving anecdotal information from employees that agency workers were being used. This issue was raised on several occasions, and the Employer consistently maintained that no agency employees were

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[6] On July 27, 2007, the Employer had requested information from the Union regarding its health insurance plan and the benefit funds offered to employees under the collective-bargaining agreement.

[7] In June 2007, prior to the commencement of bargaining for Palisade, the Union and Employer had acknowledged that the lack of a current comprehensive agreement presented obstacles to bargaining. The Employer agreed to prepare a so-called "compilation document" which initially purported to incorporate all existing terms and conditions of employment. As actually drafted by the Jasinski, the compilation document included Employer proposals – that is changes that the Employer sought to make to existing terms. Thus, as Saint Hilare noted in his letter, the Union had a number of questions regarding this document. One of the changes proposed by the Employer was the elimination of daily overtime (after 71/2 hours).

used at Palisade. [8]

With regard to the Union's information requests generally McCalla testified that the Employer presented a dual message: that the information relevant to the bargaining had already been provided but that it would endeavor to provide information which it had not yet supplied.

7. The Union's October 19, 2007 Request for Information

On October 19, 2007, Saint Hilare wrote to Jasinski requesting information which had previously been requested, but which the Union felt had not been provided. In addition, the letter reflects certain requests that had been made directly at the bargaining table. As Saint Hilare wrote:

Dear Mr. Jasinski,

The Union has made several unsuccessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we are finally beginning economic bargaining. The Union repeats its request for the following information for each of the four above referenced facilities:

1. For each employee working in a bargaining unit position such documents as will show the following:
a) Regular hours of work.
b) Number of overtime hours worked on a quarterly basis in 2006 and 2007.
c) Whether an employee is a no-frills employee.

2. Names of all agencies used by the Employer to provide temporary staff.

3. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

4. Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

5. OSHA injury and illness records for 2005, 2006, and 2007.

6. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

7. The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

8. Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current

[8] There is no contractual prohibition on the use of agency workers.

contract at each of the above referenced facilities.

With respect to this last item, because the current Union and management negotiators did not participate in the negotiations of the prior contracts with these employers, we are both at a disadvantage in compiling a full set of contracts and MOAs for each facility. The documents that you handed us in bargaining that purportedly summarized the current terms and conditions of employment from prior agreements, were inaccurate. We therefore, reiterate our request for all contracts and MOAs between the parties since 1990 that are within the possession and control of your clients.

8. On January 29, 2008, Respondent Replies to the Union's October 19, 2007 Information Request

By letter dated January 29, 2008, Jasinski issued the following response to the Union's October 19, 2007 demand for information. Enclosed with this response was a copy of the 2002 MOA as well as a collective-bargaining agreement between Palisade and 1115 Nursing Home and Hospital Employees Union (predecessor to 1199NJ), dated May 8, 1990.

As Jasinski wrote:

We are frustrated with the Union's current efforts to avoid meaningful contract negotiations. At the request of the Union, and in an effort to move the negotiations forward, we submitted a complete contract which set forth its understanding of the existing terms and conditions, as well as some limited modifications which we highlighted. Instead of showing your appreciation, the Union decided to file unfair labor practice charges alleging that I somehow misrepresented the terms of the prior contract. As you know, these allegations are patently false.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Nonetheless, the Union did what it always does -- ask for additional information that is largely duplicative and/or irrelevant to the bargaining process. Your recent request for information further represents the Union's delay and bad faith tactics.

Nonetheless, in a further effort to move the negotiations forward, we respond to your additional request for information, dated October 19, 2007, as follows.

Request No. 1

For each employee working in a bargaining unit position such documents as will show the following:

- *a) Regular hours of work;*
- *b) Number of overtime hours worked on a quarterly basis in 2006 and 2007; and*
- *c) Whether an employee is a no-frills employee.*

Response to No. 1:

This information was already provided to the Union.

Request No. 2

Names of all agencies used by the Employer to provide temporary staff.

Response to No.2
The facility does not utilize any agencies to provide temporary staff.

Request No. 3

Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

Response to No. 3

The facility does not possess any such invoices.

Request No. 4

Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

Response to No. 4

This information will be forwarded to the Union under a separate cover.

Request No. 5

OSHA injury and illness records for 2005, 2006, and 2007.

Response to No. 5

The facility does not possess such information. Furthermore, we fail to see how this information is relevant to the current negotiations.

Request No. 6

Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Response to No. 6

This information is readily available to the Union through the State. Indeed, as the Union has demonstrated in the past, you are already in possession of this information

Request No. 7

The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

Response to No. 7

This information was already provided to the Union.

Request No. 8

Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

Response to No. 8

We find it particularly troublesome that you seek copies of prior contracts and MOAs negotiated by your Union. Nonetheless, we enclose the prior contracts and all memoranda of agreements in our possession and the documents provided by the Union during the negotiations, including the KL New Jersey labor Group Contract.

* * *

Jasinski continued:

We look forward to continuing our contract negotiations and fully anticipate that the Union will resume these negotiations in good faith. All we ever wanted was to negotiate a fair contract that balances the needs of the facility, our employees, and our residents. As you have demonstrated, you have been able to negotiate and make proposals. Avoid the game-playing that has scarred other negotiations. We are not interested in game-playing and only look for a contract that addresses the needs of our employees.

McCalla testified that the overtime information sought by the Union became increasingly more important after the Employer put a proposal on the table to eliminate daily overtime. The no-frills information was sought not only to acertain whether the Employer was complying with contractual restrictions on the use of that category, but because it related to the Union's proposal to expand health care coverage, and offer dependent coverage to employees. According to McCalla, information regarding the number of employees who actually utilized insurance was important in assessing the costs to the Employer. The Union continued to seek information regarding agency usage as this related to the issue of unit erosion and because it is expensive for an employer to use such personnel. Work schedules were sought to review staffing and work load and because they would show agency usage and overtime patterns. OSHA records were sought in connection with the Union's health and safety proposals put forward during bargaining, and to ascertain whether employees were sustaining injuries at the facility. McCalla testified that the Medicaid cost reports were typically sought from an employer during bargaining. They contain information relating to the ownership and management of the home, the number of beds, the staffing and agency usage, among other things.[9]

9. The Union's February 14, 2008 Response to Respondent's January 29 letter

The parties next met on February 24, 2008.[10] Prior to this meeting, on February 14,

[9] I do not rely upon this testimony to establish what the Union told the Employer about its need for the information or its potential relevance. I rely instead on specific testimony as to what was said during meetings, the correspondence exchanged by the parties and, where applicable, McCalla's bargaining notes, which were entered into evidence.

[10] At this meeting, the Union modified its wage proposal. When asked by counsel for Respondent whether the Union had sufficient information to enable it to do so, McCalla replied,

Continued

Saint Hilare responded to the letter sent by Jasinski on Janaury 29 and the information provided therein, as follows:

> *I am responding to the letters you faxed to the Union on January 29, 2008 referencing a request for information relevant to negotiating collective bargaining agreements at the above referenced facilities that I sent you on October 19, 2008. While you sent four separate letters for each of the facilities in question, your statements were identical in each letter so I will take the liberty to respond to all of the assertions you raised in one document.*
>
> *The Union shares your frustration at the lack of progress at these negotiations though we take issue with many of the assertions in your letters. To start, the "complete contract" you submitted at each negotiation was not a faithful representation of the existing terms between the parties and you did not indicate or state that it included "highlighted modifications" when you provided the document. The changes you inserted were subsequently highlighted only after we brought them to your attention at bargaining. Further, you did not provide "all the documents responsive to ... information requests". We have raised the issue of lack of compliance with our information requests both in writing and at multiple bargaining sessions for the above referenced facilities. I will respond to your letter in the format you used. Each response represents our understanding for each of the above referenced facilities.*
>
> *<u>Request 1</u>*
>
> *1. We have not received information on overtime hours.*
> *2. We have not received a list of no-frills employees. Contrary to your claims, we cannot determine from information provided which employees are no-frills.*
>
> *<u>Request 2 and 3</u>*
>
> *Information from our members disputes the assertion that no agency CNAs are being used in the above referenced facilities.*
>
> *<u>Request 4</u>*
>
> *As I advised you on February 7, 2007 we have yet to receive the copies of work schedules for the above referenced facilities promised in your January 29, 2008 letter.*
>
> *<u>Request 5</u>*
>
> *We find it hard to believe that the facilities do not keep OSHA logs. It is my understanding that nursing homes need to keep these records. The Union has made proposals for improved health and safety standards that would be informed by this information which reflects employee injuries and illnesses.*
>
> *<u>Request 6</u>*
>
> *We understand but do not agree with your position that you need not provide Medicaid*

"We were sort of working in the dark in so many respects, but we certainly made a – we had enough information to make this proposal because we did. "

costs reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available.

Request 7

You provided only the cumulative cost for single health insurance coverage for everyone in the above referenced facilities, not the monthly per employee premium cost to each of the four employers. That vital piece of information cannot be accurately computed from the information we received. We cannot simply divide the cumulative total by the number of employees to determine the cost because the number of employees fluctuates from month to month. We do not understand why you refuse to simply provide this readily accessible monthly premium information.

Request 8

We finally received the MOAs and contracts as you promised in your January 29, 2008 letter. We are pleased to receive this information so that we can confirm past practices and benefits and bargain intelligently over the issues. We note that at least one of the KL Labor Group contracts you sent us is not a document we had and gave to you during bargaining. We presume that it is a document that the employer had in its possession and recognized as part of the bargaining history between the parties. If that is incorrect, please let me know.

The Union also looks forward to returning to negotiations and concluding collective bargaining agreements that address the legitimate needs of our members as well as the needs of the residents and operators of the facilities.

10. On April 1, 2008, Respondent Provides Additional Information to the Union

On April 1, 2008, Jasinski wrote to Saint Hilare as follows:

We provide you with the following information:

1. Amount of overtime for the previous year varied each week based on a number of factors including call-outs and unavailability of staff. Nevertheless, it is fair to estimate that overtime hours typically ranges from 100-300 hours per week over the previous year.

2. Number of no-frills employees: 4[11]

3. Agency Usage: None

4. OSHA: See attached [12]

5. Monthly insurance premiums:
289 Single
526 E+1
647 Family

[11] Respondent failed to identify these employees, as the Union had requested.
[12] Enclosed was the OSHA log for 2007.

As we have previously stated across the table, nothing has prevented the Union from engaging in negotiations. To the contrary, the Union has made proposals and counterproposals including a comprehensive contract proposal. Upon receipt and review, if you have any additional questions or comments, we respectfully request that you respond in writing.

11. The Union's Response to Respondent's April 1, 2008 Letter and Submission

On April 10, Saint Hilare responded as follows:

I am responding to your April 1, 2008 letters regarding the Union's outstanding request for bargaining information. While you sent four separate letters for each of the facilities in question, your statements were almost identical for each facility. Unless otherwise indicated, my comments below relate to all four facilities. I note that you did not provide information for Palisades other than 2007 OSHA log.

Request 1: Your response to the Union's request for overtime information is inadequate. You state, "it is fair to estimate" for all four facilities that overtime hours "typically range from 100-300 hours per week over the previous year." The Union requested the number of overtime hours worked on a quarterly basis in 2006 and 2007 for each bargaining unit employee. Your generalized estimate is not sufficient.

You provided contradictory information on the number of no-frills employees.[13]

Requests 2 and 3: You continue to deny that the facilities use agency workers.

Request 4: No schedules were provided.

Request 5: After all these months, you finally produced OSHA logs for 2007 on April 1, 2008. You did not produce logs for 2005 and 2006.

Request 6: No documents provided.

Request 7: Thank you for finally providing the monthly insurance premiums in your April 1, 2008 letter.

The piecemeal fashion in which the information has been provided and the failure to provide all the information requested, even these many months later, has made these negotiations particularly difficult. Now that we have information regarding health insurance and health and safety, we will provide you with revised proposals at our next bargaining sessions at all four facilities. Once we receive the remaining information, we will present further proposals.

12. Bargaining Continues and Respondent Submits Additional Information to the Union

There were additional meetings during the spring of 2008, which McCalla did not attend

[13] This is an apparent reference to confusion caused by another letter indicating that Palisade did not have any no-frills employees.

due to poor health. During this period, the Employer continued to furnish the Union with certain information which had previously been requested.

On May 15, 2008, Jasinski sent Hamilton an updated list of employees in the bargaining unit. [14] According to McCalla, the roster continued to raise questions regarding the insurance coverage and no-frills issues. The list contains no information whatsoever regarding the health insurance status of 19 employees and an additional 13 employees are listed as having "none." Further, the list fails to identify who is a no-frills employee.

Thereafter, on May 28, 2005, Jasinski wrote to Saint Hilare enclosing the 2005 and 2006 OSHA logs and the 2005 and 2006 Medicaid cost reports. Also provided were "total overtime hours by quarter for 2006 and 2007" as well as employee schedules for the (1) dietary department for the period from December 30, 2007 to May 3, 2008; (2) housekeeping department for the period from December 23, 2007 to April 26, 2008 and (3) for the nursing department for the period December 23, 2007 to April 12, 2008. With respect to the issue of agency usage, Jasinski wrote: "there were no agency personnel used by this facility in the requested time period."

13. The Union's June 10, 2008 Response to the Employer's May 28 Letter

On June 10, Saint Hilare sent Jasinski the following reply to his May 28 letter and the information provided therein:

> *We received the information accompanying your May 28, 2008 letter. As you know, we have been seeking this information since April 25, 2007. Your piecemeal production has greatly impaired our ability to bargain. Further, the information you provided still is not complete.*
>
> *I must also point out that since early April, 2008 at Castle Hill bargaining, I requested updated information for all four facilities. With respect to the documents produced with your May 28, 2008 letter, the production remains incomplete.*
>
> *1. Overtime hours: You did not provide overtime hours for each employee as requested for any of the four facilities. Rather, you provided a total quarterly amount for all employees, presumably across all bargaining unit job titles for 2006 and 2007. Given the employer's proposal on the elimination of daily overtime, the receipt of this information is necessary.*
>
> *At the April, 2008 session at Castle Hill, we questioned you about your response to our request for overtime information. We told you the information was necessary given your daily overtime proposal. You replied that the rough estimate you provided was all that you had to give us. We need the overtime information for June 1, 2007 through May 31, 2008, as well as for the period stated in the April 25, 2007 request. We also need it in the form described in our April 25, 2007 letter, i.e., on a quarterly basis for each employee.*
>
> *2. OSHA reports: none were provided for 2005 at Harborview.*

[14] The letter also requested that the Union schedule a date for negotiations and put forward a complete contract proposal containing economic and non-economic terms.

3. Cost Reports: It does not appear that you provided the complete and final reports as the copies provided did not contain Schedule H, the provider's certification. In addition, other pages were missing from the 2006 and 2005 reports for Castle Hill. In my February 14, 2008 letter I also asked you to provide the 2007 reports as soon as they are prepared by your clients; to date, no 2007 reports have been provided.

4. Schedules: The schedules you provided do not show all individuals who were actually working on the floors. There are daily schedules in nursing which show on a single page all individuals who actually work on all shifts on all units. Please provide the daily schedules for February 1, 2008 through the present. In addition, the LPN schedules for Harborview were provided only for one month and not even all shifts for that month. Finally, only about four months of schedules were provided for each of the four facilities.

5. Agency information: You stated in your May 28, 2008 letter that "there were no agency personnel used by this facility in the requested time period." What do you mean by requested time period? In your previous correspondence and at bargaining, you claimed that none of the facilities used agency workers. Are you now saying that agency workers have been or are being used since March 2007? If so, please provide the information regarding agency usage, as requested paragraphs 8 and 9 in my April 25, 2007 information letter for all four facilities during the period from March 2007 to the present time.

6. No-frills: You have not clarified the contradictory information provided to us on April 1, 2008.

Thank you for your anticipated cooperation.

14. Respondent's June 17, 2008 Response to the Union's June 10 Letter

On June 17, 2008, Jasinski wrote to Saint Hilare in response to the assertions set forth in his June 10 correspondence:

We are in receipt of your leter dated June 10, 2008. On May 28th we informed you that we have provided you with all of the information in our possession. Yet, you continue to insist that our production somehow "remains incomplete" or the information was not provided in the form that you requested.

We concede that the information may not be in the form you requested, however it is complete. It is apparent that the Union has absolutely no interest in using any of this information for legitimate purposes at the bargaining table. Rather, the Union's strategy is transparent - to use these information requests to avoid real bargaining and to try to avoid reaching impasse. Instead of continuing your bad faith conduct by putting forth irrelevant and harassing information requests, I suggest that you refocus your energies to engage in meaningful bargaining so that the parties can reach a contract for the benefit of our employees.

We respond to your specific allegations as follows:

1. The approximate average overtime worked per employee are as follows:

1st Quarter 2006 - 35 hrs
2nd Quarter 2006 - 30 hrs

3rd Quarter 2006 - 36hrs
4th Quarter 2006 - 32 hrs

1st Quarter 2007 - 36 hrs
2nd Quarter 2007 - 40 hrs
3rd Quarter 2007 - 41hrs
4th Quarter 2007 - 34 hrs

More importantly, contrary to your assertion, our proposal was not to eliminate overtime. To the contrary, all bargaining unit employees will continue to be paid overtime compensation on a weekly basis. We stated this at the bargaining table.

2. As you concede, we provided you with all the requested OSHA reports.

3. We provided you with the 2005 and 2006 cost reports in their entirety. We provided you with these cost reports even though they are typically not considered to be relevant in negotiations, and you have not demonstrated any need for these documents. Troy Hills Nursing Home, 326 NLRB 1465, n.2 (1998). We are uncertain what "Schedule H" is or what possible relevance a provider's certification has to the negotiations. Accordingly, please provide us with the specific reasons, as you are required under Board law, why you consider such information relevant to the bargaining.

4. We provided you with all the schedules in our possession. We cannot provide them in a form which does not exist.

5. This facility did not utilize agency personnel from March 2007 through the present.

6. Palisade has four employees in the no-frills category.

We recognize that you are currently away on vacation. In fact, we know that you have been unavailable since the end of May to conduct contract negotiations. and will be unable to schedule any contract negotiations for the rest of the month. We suggest that you propose dates in July and August that will not conflict with your schedule.

Thank you.

With regard to the overtime information sought by the Union, McCalla testified that the Union still needed the information in the form requested to enable the Union to assess how the Employer's proposal to eliminate daily overtime would affect the unit and to decide decide how strongly to hold onto its position regarding maintaining the status quo.

15. The Parties Meet on July 21 and The Union Requests Information on July 23 and September 4, 2008

On July 21, 2008 the parties met again. At this session the Union modified its economic proposal. When asked on cross-examination what factors the Union relied upon to make this modification, McCalla stated that the Union was making a compromise by not suggesting full retroactivity and was trying to move closer to the Employer's position. McCalla was asked whether there was any information received by the Union between February 11, 2008 (the date of its prior contract proposal) and July 23 which helped formulate its proposal on this occasion, and McCalla stated that he could not recall what had been received or whether it had factored into the construct of the July 23 counter-proposal.

At this meeting, the Union again asked to review the employee roster and clarify employees' no-frills and health insurance status. As a result of the discussion held on that date, on July 23, 2008, Hamilton sent the following letter to Jasinski:

> *Enclosed please find a copy of the list of employees you supplied on May 15, 2008. Please clarify the health insurance status of the C.N.A.s and Recreation Aides employees on pages 1, 2 that have no designation in the "HI Status" column. Also clarify the status of the Housekeeping aides, Laundry and Dietary aides employees that have "none" in the "Health ins" column. We asked for this information in our July 21, 2008 bargaining session. Please supply this information by Monday, July 28, 2008 so we can review it before our next bargaining session*

Hamilton sent a follow-up letter dated September 4, 2008 reiterating the above request and offering various bargaining dates for the month of September.

16. The January 30, 2009 Request for Information

On January 30, 2009, Hamilton sent a letter requesting that the Employer provide certain information prior to the next bargaining session scheduled for February 4, 2009. In particular he requested that the Employer provide a current list of no-frill employees; the name and number of hours regularly worked each week by each part-time employee and overtime by individual, agency usage and schedules as had been requested in prior information requests.

17. The February 4, 2009 Bargaining Session

At some point prior to this meeting, the Employer had put forward a "final offer." McCalla's bargaining notes indicate that various features of this proposal were discussed at this meeting, including those related to the Union's prior information requests. One of the propoals sought to raise the threshold for eligibility for benefits from 20 hours to 30 hours per week. At this meeting, the Union informed the Employer that it wanted to know the exact hours of the part-time employees to ascertain which employees would lose benefits under the Employer's proposal. The Union again raised the issue of no-frills employees and health coverage. The Employer stated that employees might not have coverage for reasons other than no-frills status including that they were too recently employed, worked insufficient hours to qualify or that the employee had simply not followed through with an application for benefits. The Union stated that this did not seem to be a legitimate response because the Employer could follow through administratively to ensure that employees received benefits they were entitled to.

At this meeting, the Union made a counter-proposal suggesting a four-year ageement with a $325 signing bonus for employees and 17 percent wage increase over the life of the agreement.

18. The March 31, 2009 Employee Roster

On March 31, 2009, Jasinski sent the Union a revised employee roster with wage rates, hire dates, employment status, average hours, no-frills information, and per-employee overtime hours for 2008. The Union was also provided with the names and hours worked by part-time employees.

19. The June 30, 2009 Meeting

The parties met yet again on June 30, 2009. McCalla testified that he did not recall whether there was a discussion of the Union's information requests at this meeting, McCalla's bargaining notes indicate that the parties discussed health insurance. The notes also reference the Employer's statement that the parties were at impasse and that the Union disputed that claim. The Union stated that it intended to to prepare and present further counter-offers.

B. The Alleged Failure to Remit Pension Contributions

1. The Amendment to the Complaint

The charge in Case No. 22-CA-28154, as originally filed on December 3, 2007, alleges, in relevant part, that: "Since on or about July, 2007, the above named Employer through its officers, agents and representative David Jasinski has failed and refused to furnish information to the Union necessary to collective bargaining negotiations."[15]

On April 9, 2009, the Union amended that charge to add the following allegation: "Since in or about July 2007, the above-named Employer unilaterally failed to make pension fund contributions without notifying or bargaining with the Union." The regional office mailed the amended charge to the Respondent and its counsel of record on April 10, the following day. Following an investigation, on October 1, 2009, Counsel for the General Counsel issued a notice of intention to amend the complaint to allege that since on or about February 1, 2007, the Respondent unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union, and so moved at the opening of the hearing.

Respondent objected to the proposed amendment, arguing that the amendment was outside the scope of the complaint, which involved a only a failure to provide information. Respondent further argued that the issue should have been resolved through the grievance and arbitration provisions of the expired collective-bargaining agreement. Respondent additionally contended that the Union lacks standing to bring such a claim, and denied the material allegations of the amendment. In its post-hearing brief Respondent also asserts that the allegations of the amended charge are barred by the Section 10(b) statute of limitations.

At the hearing, I reserved ruling on the motion to amend the complaint to include this additional allegation. As has been noted above, it is hereby granted. See generally, *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774 (1997); Board Rules and Regulations Section 102.35(a)(8)(administrative law judge in an unfair labor practice case has authority, on the motion of any party, to order proceedings consolidated or severed).

The evidence adduced with respect to this allegation consisted primarily of the testimony of Betsy Blount, who has been employed by the SEIU National Industry Pension Fund (the Fund) since 2000 in various positions, together with certain documentary evidence which was maintained in the Fund's files, as will be discussed below.[16]

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[15] There is another allegation, contained in the charge as filed in December 2007, that the Employer falsely presented to the Union a document purporting to represent existing terms and conditions of employment, which is not a subject of the instant complaint.

[16] With the exception of one document which Respondent sought to introduce into the record, which is discussed below, the testimonial and documentary evidence relating to this allegation of the compliant was adduced in *Castle Hill Health Care Center*, Case Nos. 22-CA-28152 and 22-CA-28548 (JD(NY)-44-09, December 14, 2009). The parties stipulated the testimony and documentary evidence into the record herein.

2. Background

By letter dated November 22, 2002, the Union's then-attorney, Richard M. Greenspan, forwarded to the Fund a copy of the pension appendix executed by the parties in conjunction with the 2002 MOA. Beginning in about August 2002, contributions were remitted. However, payments for Palisade employees were made by three entities. Palisade made, and apparently has continued to remit, contributions for the dietary employees of the facility. It is undisputed that contributions for the certified nurses aides were drawn on the checks of an entity called Healthcare Staffing & Consultants, LLC (Healthcare). Similarly, contributions on behalf of the recreation employees were drawn on the checks of Sunshine Recreation, LLC (Sunshine). [17]

Some four years later, on November 5, 2006, SEIU international representative Larry Alcoff sent an e-mail to Fund collections manager Jack Salm about remittances for the Omni employees:

Jack,

I want to follow up on the list of pension issues in NJ that we discussed on the phone last week:

Omni Mgmt group (Castle Hill, Bristol Manor, Palisades and Harborview) -The Employer is a party to 4 separate CBA's with the Union. The Employer has made contributions for the past 4 years pursuant to those CBA's; however the Pension Fund failed to deposit those checks. The Employer provided a letter to the Pension Fund over 1 year ago stating that the nursing homes were the parties to the agreement and the Employer. The Pension contributions were made by their contracted payroll operations. We requested that the Pension Fund deposit all checks and give members appropriate service and vesting credit.

We have not received any reports or copied correspondence (whether to the Employers or legal documents) to date. Please reply.

On November 8, 2006, Sahm replied to Alcoff's e-mail with the following inquiries:

In item three of your e-mail, you mention Omni Management Group. The checks we have are from Healthcare Staffing & Consultants LLC and Sunshine Recreation, LLC. A couple of questions-

1. Who are the CBA's with – Omni Management Group or the individual properties?
2. Please forward copies of the four (4) CBA's that you mentioned in your e-mail
3. Is Heathcare staffing now out of the picture?

As for item 2 of your e-mail, we are in the process of putting toether all of the information for our Collection Counsel. We will keep you apprised of all developments.

Later that day, Alcoff replied:

We will send you the 4 most recent MOUs with Bristol Manor, Harborview, Palisades

[17] The record is silent with regard to contributions made on behalf of other unit employees.

and Castle Hill. Healthcare Staffing is not relevant.

There is no record evidence of any further communications between Alcoff and Sahm regarding these matters.

3. The Alleged Failure to Remit Pension Fund Contributions

In May 2007, Blount was promoted to the position of Fund collection manager.[18] Prior to that time she served as an assistant manager in the Fund's processing department. As Blount testified, after an employer and a local union execute a collective-bargaining agreement, the contract is submitted to the Fund to ascertain that it conforms to Fund requirements and is then submitted to counsel for final approval. Once such approval is granted, the collection department establishes a computer file with an employer number and site number. If the contract is not approved, it is returned to the parties with a letter indicating the language necessary for compliance with Fund requirements.

Blount testified that after she became collection manager, she was assigned to investigate a group of checks that the Fund did not have contracts for and determine who they belonged to. These were the checks drawn on the accounts of Healthcare and Sunshine. As Blount testified, because Healthcare and Sunshine were not parties to collective-bargaining agreements, files had not been created for them in the Fund computer database and they were not recognized as employer participants.

Thereafter, the Fund trustees determined that, inasmuch as Healthcare and Sunshine were not parties to collective-bargaining agreements authorizing the Fund to accept their contributions, the remittances should be returned. Accordingly, on October 10, 2008, Blount wrote separately to Healthcare and Sunshine as follows:

Please find enclosed checks issued by [Healthcare] [Sunshine] for the period of August 2003 through January 2007.

Unfortunately, the SEIU National Industry Pension Fund (NIPF) has been unable to process these payments because we have not reveived a signed copy of the Collective Bargaining Agreement (CBA) between [Healthcare] [Sunshine], and SEIU Local 1199 NJ which requires contributions to the fund. The NIPF has made numerous attempts to Local 1199NJ to obtain a signed copy of the CBA, which have been unsucessful.

In accordance with a recent Board of Trustee decision, to return contributions to employers without an acceptable CBA on file with the Fund within 6 months or more after the receipt of the first contribution payment, we are returning and refunding all checks that have been received from [Healthcare] [Sunshine]. In addition, most of the checks are older than 6 months and would have to be reissued upon receipt of the acceptable CBA.

Please be advsied that we will not accept any future payments from [Healthcare] [Sunshine] until we receive an acceptable signed copy of the CBA. Lastly, please keep in mind that once an acceptable CBA is received late fees and interest wil be assessed on contribution payments older than 30 days.

[18] She currently serves as the Fund's benefits processing manager.

A copy of this letter was sent to the SEIU Local 1199NJ President Milly Silva.

As Blount testified, after this letter was sent, Silva and Union attorney Ellen Dichner contacted her to discuss why the Fund had decided to return the contributions from Healthcare and Sunshine. A conference call was scheduled on two prior occasions, but did not occur until February 9, 2009.

On February 9, a telephonic conference was held among Blount, Silva, Dichner and other Fund personnel. Blount explained that the Fund did not have signed contracts with Healthcare and Sunshine and that therefore, the pension contributions were returned to these vendors. Silva and Dichner maintained that the local union had sent the Fund copies of the applicable MOAs and urged the Fund to search their files for the relevant documents.

Blount testified that at that point she undertook an investigation and learned that Healthcare and Sunshine had been contributing for CNAs and recreation employees, respectively, for the Omni facilities. She additionally learned that both Healthcare and Sunshine had ceased making contributions to the Fund as of January 2007.[19]

The last check sent by Healthcare, dated May 9, 2007, is for contributions applicable to January of that year. Similarly the last check sent by Sunshine, dated May 8, 2007, is for January 2007 contributions to the Fund. Both checks are attached to rosters of covered employees which reference the various Omni facilities by name. Blount offered no explanation as to why these reports would not have, or did not, assist the Fund in ascertaining which employees the contributions were being made on behalf of.

At some point after the February 2009 conference call, the Fund advised the Union that the Employer had ceased remitting contributions for periods after January 2007. The Union was further told that the Fund had reversed its decision to refund contributions to Healthcare and Sunshine and that both vendors would be set up in the Fund's system pursuant to the 2002 MOA.

On April 9, Fund collection manager Miriam Gibbs wrote to Healthcare and Sunshine advising as follows:

> *A letter was sent to you dated October 10, 2008, notifying you that the SEIU National Industry Pension Fund was unable to process your payments due to non receipt of a signed collective bargaining agreement. . .*
>
> *We have subsequently received signed collective bargaining agreements, enabling the Fund to properly setup your account. The initial date of contribution is September 1, 2002. Contributions are presently due for September 1, 2002 through March 31, 2009. Additionally, remittance reports are due for the following periods: September 2002 through July 2003 and January 2007 through March 2009.*
>
> *Although the National Industry Pension Fund will accept the collective bargaining agreement for the term of July 25, 2002 thorugh July 24, 2007, any new agreements requiring contributions to the National Industry Pension Fund must adhere to the terms of the enclosed Bargaining Basics Manual. For example:*

[19] Blount offered no explanation of why she did not become aware of this in October 2008, when she returned the remittances to Healthcare and Sunshine.

1. Pension contributions are required on all bargainining unit employees from date of hire or no later than 90 days of employment and all other employees (such as temporary, casual, on-call, extra, seasonal and no frill) are covered after 1,000 hours of employment.

2. The CBA must specify the pension contribution rate as a flat dollar amount or a percentage of pay. The minimum contribution rate is $0.15 per hour for all new contracts and renewals with effective dates after July 1, 2004.

3. The CBA must clearly state that the pension contributions are to be remitted to SEIU National Industry Pension Fund.

4. All employers must agree to be tound by the NIPF Trust Agreement.

There was no response to these letters.[20]

III. Analysis and Conclusions

A. *The Alleged Failure to Provide Information*

The complaint alleges and General Counsel contends that the following information sought by the Union is presumptively relevant or, alternatively, that its relevance has been demonstrated: documents showing overtime hours worked by bargaining unit employees on a quarterly basis in 2006 and 2007, [21] the names of no-frills employees, the names of agencies used by Respondent for temporary staff and copies of invoices showing names, number of hours worked, rates billed and job titles for each agency employee, copies of work schedules, OSHA injury and illness reports for 2005, 2006 and 2007, copies of Medicaid cost reports for 2005 and 2006 and per-employee monthly premium cost for employer-funded single health insurance. The General Counsel further contends that, since October 19, 2007, the Employer has either failed and refused or unlawfully delayed in providing such information to the Union. As discussed in further detail below, Respondent contends that it sufficiently complied with the

[20] At the hearing Respondent sought to introduce into evidence a document which purports to be a summary of checks issued by Palisade, Healthcare and Sunshine, sent to the Fund during the period from January 2008 through June 2009, showing which checks were cleared and which were not. No testimony was adduced with respect to this document. Moreover, Respondent has failed to present sufficient evidence to allow me to draw any specific finding regarding whether these remittances covered the relevant unit employees or whether they fully satisfied Respondent's obligations to the Fund for the applicable period of time. I further note that Respondent makes no reference to this summary or its purported evidentiary value in its post-hearing brief and, for all the foregoing reasons, I do not rely upon it. Moreover, if I were to find that the summary represents efforts by Healthcare and Sunshine, on behalf of Respondent, to resume contributions to the Fund for unit employees for the period from January 2008 through June 2009, such a finding would not be determinative of whether the Respondent had committed an unfair labor practice, as alleged in the complaint, but would be a matter of mitigation appropriately addressed in a compliance proceeding.

[21] The complaint additionally alleges a failure or delay in providing documents showing "regular hours of work." The General Counsel does not make specific reference to any such allegation other than the alleged failure to provide employee work schedules, which is discussed below.

Union's information requests to allow it to meaningfully bargain and that the Union's repeated requests were interposed in bad faith, for the purpose of delay and to forestall a valid bargaining impasse.

1. Applicable Legal Principles

It is well-settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess proposals and claims made by the employer relevant to contract negotiations. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435-436 (1967). *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 153 (1956).

Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). In such an instance, the employer bears the burden of showing a lack of relevance. *AK Steel Co*., 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance of information pertaining to employees within the bargaining unit and has no further obligation to explain its significance, unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001): "When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy."

Requests for matters outside the bargaining unit require a demonstration of relevance. *Shoppers Food Warehouse Corp*., 315 NLRB 258, 259 (1994); *Ohio Power Co*., 216 NLRB 987, 991 (1975), enfd. 531 F. 2d 1381 (6th Cir. 1976). The Board uses a broad, discovery-type standard in determining the relevance of requested information. Thus, the burden is not an exceptionally heavy one, requiring only that the desired information would be of use to the party in carrying out its statutory duties and responsibilities. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse*, supra; *Richmond Health Care*, 332 NLRB 1034, 1035 (2000) (potential or probable relevance is sufficient to give rise to an employer's obligation to provide information). A party has satisfied such a burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. However, the Board has also held that, as to non-unit information for which relevance must be demonstrated, the General Counsel must present evidence either that the union demonstrated the relevance of the non-unit information or that the relevance of the information should have been apparent to the respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The Union's explanation of relevance "must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." 350 NLRB at 1258 fn. 5 (citations omitted).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Woodland Clinic*, 335 NLRB 735, 736 (2006); *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993). "An employer must respond to the information request in a timely manner" and "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all." *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345

NLRB 1229, 1237 (2005) (and cases cited therein).

2. Respondent's Contentions as to the Alleged Failure to Provide Information

With regard to the Union's information requests generally, Respondent argues that the Union propounded such requests on Palisade for reasons other than to move the bargaining process forward. In particular, Respondent argues that the Union's information requests were made to avoid meaningful bargaining and in a futile attempt to avoid reaching impasse. In support of this argument, Respondent contends that the Union repeatedly demanded information which had already been received, which was readily attainable or wholly unnecessary to the bargaining process or that it was not entitled to obtain. Respondent additionally contends that it responded to the Union's initial information request prior to the first bargaining session and asserts that the Union never objected that this initial production was incomplete. [22]

Respondent thus argues that it sufficiently complied with the Union's repeated information requests, that it provided information to the Union on numerous occasions and, further, that any limited delay in providing information is not unlawful. In addition, as Respondent contends, the Union's repeated information requests constitute evidence of its bad faith in negotiations.

Respondent argues that that the Union was able to, and did, make its initial "comprehensive" proposal relying on the information already within its possession, and did not require any further information prior to putting forth subsequent proposals. In this regard, Respondent relies upon testimony, adduced from Union witnesses, that the Union formulated its proposals based upon factors such as input from employees, knowledge of general employment standards in the industry and a negotiating strategy based upon their assessment of what could be obtained through negotiations with this particular employer. Respondent argues that such testimony constitutes an admission that the Union did not require the information to negotiate.

In support of its contention that the Union's information request was made in bad faith, Respondent relies upon *H&H Pretzel Co.*, 277 NLRB 1327 (1985), enfd. 831 F.2d 650 (6th Cir. 1987) and *Jefferson Smurfit Corp.*, 311 NLRB 41 (1993). However, neither case is relevant to the circumstances presented here. In *H&H Pretzel*, supra at 1334, the union's request for financial information was found to be untimely and a "dilatory request" when made after its rejection of the employer's final offer and reaching impasse in negotiations. *Jefferson Smurfit*, supra, similarly involved a belated information request interposed for the purposes of delay, which was made in conjunction with other acts indicating bad faith including a refusal to meet more frequently or address key employer proposals. 311 NLRB at 60. Here, as outlined above, the Union's information requests were initially made prior to and reiterated throughout bargaining and were related to terms and conditions of employment and mandatory subjects of bargaining. Moreover, based upon the history of negotiations as set forth in this record, it cannot be said that the possibility of meaningful bargaining had run its course at the time of the Union's October 19, 2007 or February 14, 2008 information requests, which are those that are

[22] Here, Respondent misconstrues the record. As has been noted above, on June 4 (prior to the first negotiation session) Saint Hilare wrote to Respondent objecting that its response to the April 25 information request was incomplete. The Union then raised the issue of Respondent's incomplete compliance contemporaneously with the first meeting, on July 17, 2007, and, as Respondent acknowledges and the record reflects, on numerous occasions thereafter.

specifically referenced in the complaint.

While it is undeniably the case that Respondent did provide certain information to the Union as had been requested, it is also apparent that other information was delayed and further information not provided at all. As the above-cited cases demonstrate, Respondent is not empowered to make a unilateral determination that presumptively or otherwise demonstrably relevant information sought by the Union is unnecessary or irrelevant to bargaining or the performance of the Union's statutory duties. To the contrary, Respondent's arguments in this regard have been rejected by the Board. "That the information appears unnecessary to an employer is obviously an inadequate ground for refusal …" *Amphlett Printing Company,* 237 NLRB 955, 956 (1978); *Providence Hospital*, 320 NLRB 791, 795 (1996).

Moreover, the Board has found that it is reasonable to infer that if the information sought by the Union had been provided in a timely fashion, it could have been used to determine strategy and tactics in the negotiations: "Priority of issues, consideration of bargaining strategy as to trade-offs of economic and non-economic issues, even the nature and extent of the bargaining posture on the various issues might well have been impacted upon by such information and the need therefore would be current and present throughout the negotiations." *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1014 (1996). Further, contrary to Respondent's contentions, the fact that a contract has been negotiated without the requested data does not prove that the information is not relevant or that it need not be provided. See *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260, 266 (2d Cir. 1963); cert denied, 375 U.S. 834. In *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1941), the court stated:

> Nor is our determination that the information was relevant affected by the subsequent execution of a contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

In support of its contention that any alleged delay in providing the Union with information was not unlawful, Respondent relies upon *Good Life Beverage Co*., 312 NLRB 1060 (1993) and *Union Carbide Corp*., 275 NLRB 197 (1985). In *Good Life Beverage Co*., supra, the Board found that a five and one-half month delay in providing information was not unlawful where the information sought raised confidentiality concerns and the employer sought to discuss the matter to reach an accommodation with the requesting union for mutually agreeable protective conditions. Here, Respondent has pointed to no such circumstances. In *Union Carbide*, which dealt with a delay of over ten months, there was no showing that the requested information, which was voluminous, could have been produced any sooner, that there was any urgency in fulfilling the request or that it involved a matter currently or forthcoming in any negotiations between the parties.

In the instant case, while it appears that the Union requested a significant amount of information from the Employer initially, and subsequently, Respondent has failed to argue or to present any evidence that any alleged delay in providing information was due to the volume of that request, or Respondent's need for time to assemble it or receive documentation relative to such demands.[23] Moreover, the record fails to establish that Respondent raised any such

[23] In this regard I note that the Union initially made an information request in April 2007. The October 2007 and February 2008 requests referred to in the complaint, for the most part, reiterate this prior request to the extent it had not been complied with. Thus, it is apparent that Respondent had a significant period of time to assemble the information sought.

objection to the Union. Nor has Respondent propounded such an argument here. Rather, as set forth above, Respondent consistently took the position either that it had fully complied with the Union's request or that the information sought was unnecessary for the Union to bargain.

Moreover, contrary to Respondent's suggestion, the Board has consistently found an unexplained delay in furnishing relevant information to be unlawful. See e.g. *Woodland Clinic*, supra at 736 (delay of seven weeks unreasonable, absent explanation); *Bundy Corp*., 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within two weeks, providing some information, but did not supply rest of information required until six weeks later and no explanation provided for "foot dragging"); *International Credit Service*, 240 NLRB 715, 718 (1979) (unexplained delay of six weeks unreasonable); Local 12 Engineers, 237 NLRB 1556, 1558-1559(1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc*., 212 NLRB 677, 678 (1974)(employer unreasonably failed to respond to information requests for over one month and did so only after charge filed).

Respondent additionally contends that the circumstances of the instant case are "strikingly similar" to those presented in *United Engines Inc*., 222 NLRB 50, 55-56 (1976). There, the respondent was charged with a delay in transmitting certain relevant data which the union sought in connection with bargaining negotiations until it was informed that the union had filed unfair labor practices with the Board. The administrative law judge found that the respondent had not violated the Act. In that case however, the respondent never raised any objection to disclosure of the information sought by the union, characterized as "copious" and provided the bulk of it within one month of the Union's request. The only outstanding item was the information related to the employer's retirement plan, which the respondent said would be covered in a booklet and provided as soon as it was received. The booklet was then provided. Thereafter, as the judge found, the respondent "invited further requests" by the Union for additional information. Once such requests were made, the information was promptly furnished. In disagreement with Respondent, I fail to find that the circumstances presented in *United Engines*, supra have particular relevance to the instant case.

With the foregoing standards in mind, I will now evaluate the various information requests made by the Union and the Respondent's responses thereto.

3. The Information Requests

a. Overtime Hours Worked by Each Employee on a Quarterly Basis

From the outset, even prior to the initiation of bargaining, the Union sought information showing the overtime hours for each employee on a quarterly basis for the years 2006 and 2007. Information regarding employee overtime, and in particular, overtime information worked by individual employees has been found to be presumptively relevant. *U.S. Information Services*, 341 NLRB 988 (2004) (citing *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434, 436 (1988) (total hours and overtime hours worked "by each unit employee" is presumptively relevant). The record shows that in and subsequent to the October 19, 2007 letter, the Union made a request for such information both verbally and in writing on any number of occasions. Moreover, the record shows that in his letter of June 10, 2008, Saint Hilare specifically advised Respondent that such information was necessary to enable the Union to properly evaluate the impact of its proposal to eliminate daily overtime.

On January 29, 2008, Jasinski stated that such information had been provided to the

Union, which as the record demonstrates, is not the case. In fact, no overtime information whatsoever was provided to the Union until April 1, 2008, where it was stated that, "It is fair to estimate that overtime hours typically [range] from 100-300 hours per week over the previous year." The Union then advised Respondent that that was not the information which had been requested. Thereafter, on May 28, 2008, Respondent provided "total overtime hours by quarter of 2006 and 2007" but, again, did not provide the information for individual employees. On June 10, the Union reiterated its request for "overtime hours for each employee." On June 17, 2008, Respondent responded with the "the approximate average overtime worked per employee" for each quarter of 2006 and 2007. It was not until March 2009 that Respondent provided overtime information to the Union broken down by employee, but this production was again incomplete as it provided such information in the aggregate for the year and only for 2008. Respondent has offered no explanation of why it was unable to respond to the Union's initial request for overtime information, and there is no evidence of any such inability in the record.

Aside from its presumptive relevance, it is clear from the record that such information took on additional significance in light of the Employer's proposal to eliminate daily overtime. Thus, the Union has shown that this information was relevant and necessary to enable it to determine the impact the Employer's workweek proposal would have on the bargaining unit, both in relation to individual employees and to the unit as a whole.

Accordingly, I find that by failing and refusing to provide the Union with overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007, as alleged in the complaint, Respondent has violated Section 8(a)(1) and (5) of the Act.

b. The Identification of No-Frills Employees

On October 19, 2007, the Union requested, as it had done previously, that the Employer state whether an employee is no-frills employee, thereby requesting that such employees be individually identified. The record establishes that the Union renewed its request both verbally and in writing on numerous occasions. In its letter of April 1, 2008, Respondent advised the Union that there were four no-frills employees, but failed to identify them. The identities of the no-frills employees were not disclosed until Respondent provided an updated employee list on March 31, 2009 – well over one year after the Union requested such information on October 19, 2007.

The issue of whether bargaining unit employees have agreed to forfeit contractual benefits in exchange for an increased wage rate, and who has agreed to do so, is presumptively relevant. Moreover, the record demonstrates that the issue of whether there were no-frills employees was related to various matters under consideration during negotiations, including health insurance. In addition, the Employer had proposed increasing the limit on such employees from 10 to 20.

Respondent has failed to offer and the record fails to establish any reasonable explanation for its delay in providing such information to the Union. Accordingly, I find that Respondent's failure to identify its no-frills employees in a timely fashion constitutes a failure to provide information in violation of the Act.

c. Work Schedules

The complaint alleges that the Employer failed and refused or, alternatively, delayed in providing employee work schedules to the Union. In his October 19, 2007 letter, and at various other times throughout bargaining, the Union requested such information for the periods of

October through December 2006 and January through March 2007. On January 29, 2008, Jasinski wrote the schedules would be provided under separate cover. However, it was not until May 28, 2008, that Respondent provided work schedules for the dietary, housekeeping and nursing departments for the period beginning in late-December 2007 and continuing through approximately April 2008. On June 10, 2008, Saint Hilare responded that the submission was not fully responsive to the Union's request. Saint Hilare also made an additional request for the daily schedules for February 1, 2008 through the present. On June 17, 2008 Jasinski wrote that the Employer had provided the Union with all the schedules in its possession and that it could not provide the information in a form which does not exist.

Such information, as it relates to bargaining unit employees, is presumptively relevant. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008). Moreover, it is relevant to the Union's investigation of employee reports of agency usage. Respondent has failed to explain the delay in providing work schedules to the Union, or to offer any valid explanation of why it could not fully comply with the Union's initial request for their production.[24]

Accordingly, I find that Respondent has unlawfully delayed and refused to provide the Union with work schedules of bargaining unit employees, as alleged in the complaint.

d. OSHA Injury and Illness Records

The Employer maintains OSHA records which document on the job injuries and illnesses. On October 19, 2007, the Union requested copies of such records for 2005, 2006 and 2007. In his January 29, 2008 letter, Jasinski stated that the facility did not maintain such records. The record establishes that this assertion was contrary to the practice at the facility. The Union's request for OSHA logs was renewed in Saint Hilare's letter of February 14, 2008. Thereafter, on April 1, Respondent provided the log for 2007. On April 10, 2008, Saint Hilare reiterated the Union's request for years 2005 and 2006. Those records were provided on May 28.

As the Board has found, workplace safety is a mandatory subject of bargaining. See *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000). Accordingly, the Board has found that OSHA logs and other health and safety information is presumptively relevant. *Honda of Hayward*, 314 NLRB 443, 451 (1994). Moreover, Saint Hilare and McCalla testified that such records would be of assistance to the Union in formulating its health and safety proposals. Respondent has failed to rebut the presumption that this information is relevant or to offer any valid explanation of why it failed to provide such information to the Union for more than six months after the October 19, 2007 request. Accordingly, I find that Respondent unlawfully delayed the production of OSHA logs for 2005, 2006 and 2007, as alleged in the complaint.

e. Health Insurance Premium Information

On June 22, 2007, the Employer provided the Union with the total cost for health insurance premiums for 2006 and the first quarter of 2007. The Union had also previously been provided with the cost to employees for dependent coverage. What the Union did not know was the cost to the Employer for its employees' single coverage and, therefore, the Union requested such information in Saint Hilare's October 19 letter.

[24] Moreover, it is reasonable to assume that, had the Employer complied with the Union's request in a timely fashion, it is likely that additional schedules could have been produced.

On January 29, 2008, Respondent wrote that such information had already been provided. By letter dated February 14, Saint Hilare explained that the information had not been provided and could not be computed, as had been suggested, by dividing the cumulative cost furnished by the number of employees because the number of employees fluctuated from month to month. On April 1, 2008, Respondent provided the monthly insurance premium cost sought by the Union.

The Board has held that premiums paid under health insurance plans are wages, and as such, information regarding premiums is presumptively relevant. *The Nestle Company*, 238 NLRB 92, 94 (1978). Further, it is apparent that the cost of employee fringe benefits is of particular relevance during collective bargaining negotiations.

Moreover, in this case, such information related to an issue central to the parties during bargaining; i.e. whether the Employer would (or would not) agree to some measure of dependent coverage for its employees. Clearly, understanding the costs to the Employer of providing health insurance coverage for its employees might well be of some relevance to the Union in formulating a proposal to bridge the gap between the parties' positions. *Baldwin Shop N' Save*, 314 NLRB 114, 124 (1994).[25] Accordingly, I find the delay in providing such information to be unlawful.

f. Medicaid Cost Reports

On October 19, 2007, the Union requested copies of Medicaid cost reports for 2005 and 2006. These reports are voluminous, and there is evidence that the Union's research department makes use of them to obtain general information about the size, finances and operations of the nursing home.

On January 29, 2008, Respondent replied that the information was readily available from the State, and that the Union had demonstrated that they are already in possession of such information. On February 14, Saint Hilare wrote: "We understand but do not agree with your position that you need not provide Medicaid cost reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available." On April 9 Saint Hilare noted in a letter to Jasinski that the reports had not yet been received. The reports for 2005 and 2006 were provided by Respondent on May 28, 2008.[26]

Respondent has argued that this information is not relevant and that by seeking such information, the Union has demonstrated its bad faith.

Respondent's apparent position, as stated to the Union, that it was under no obligation to provide the requested data because it could have been gotten from public records is not supported by extant Board law. To the contrary, the duty of an employer to provide relevant information in its possession is not excused by the fact that it may be obtained elsewhere. *Kroger Co.*, 226 NLRB 512, 513-514 (1976); *People Care, Inc.*, 327 NLRB 814, 824 (1999); *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

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[25] In *Baldwin Shop' N Save,* supra at 124, fn. 8, it was noted that in *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852, the court held "that the Board could properly find that a union was entitled to information concerning the cost of welfare benefits, where the union sought 'better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay.'"

[26] It does not appear from the record that Respondent ever produced the 2007 report.

I do not agree with Respondent that the Medicaid cost reports do not contain relevant information. Rather, I find that, inasmuch as they contain primarily non-unit information, their relevance must be demonstrated. Here, I find that there is doubt about whether the Union, at any point during negotiations, sufficiently articulated "with some precision" the basis for its request or demonstrated why such documents would be relevant to bargaining or to any of the Union's other statutory duties and responsibilities. *Disneyland Park*, supra at 1258. I note that there is no evidence that the Union negotiators ever specifically stated to the Employer why the Union was seeking this information, and there is no such explanation in any of the correspondence in the record.[27]

In *Troy Hills Nursing Home*, 326 NLRB 1465 fn. 2 (1998), the Board denied the General Counsel's motion for summary judgment as to the respondent's failure to provide Medicare and Medicaid cost reports, finding that they appeared to seek financial information, were not presumptively relevant and that the union had not demonstrated the relevance of such information to the employer. Here too, I find that the General Counsel has failed to meet its burden to show that the Union established the relevance of the information or that such relevance would have been apparent to Respondent. *Disneyland Park*, supra.

New Surfside Nursing Home, 330 NLRB 1146 (2000), cited by the General Counsel, reached a contrary result. There, however, the administrative law judge specifically found that the union agent "explained why the cost reports were relevant to negotiations." 330 NLRB at 1148. The Board, in affirming the judge, specifically noted that the Union had demonstrated the relevance of the information sought. Here, there is no such evidence and, therefore, I cannot reach a similar conclusion.

Inasmuch as I find that the Union failed to demonstrate the relevance of the Medicaid cost reports and, further, that the General Counsel has not sufficiently established that their relevance would have been apparent to the Employer, I do not find that Respondent has violated the Act by delaying their production, or by failing to provide them in their entirety.

g. <u>The Use of Agency Employees</u>

The General Counsel has additionally alleged that Respondent failed and refused or to provide information to the Union regarding its use of agency employees at its facility.

The Union's October 19, 2007 letter sought the names of all agencies used by the Employer to provide temporary staff and invoices showing the names, number of hours worked, rate(s) billed and job title for each employee provided to the Employer during the period from January 1, 2006 through March 31, 2007. The Union reiterated its request for information regarding the use of agency employees on several occasions thereafter, both at the bargaining table and in writing. On July 23, 2008, the Union updated its request to seek information about possible agency use for the period from January 1 through July 22, 2008.[28] McCalla testified that the Union had received reports from employees that agency employees were being used during the period of time the parties were bargaining. Such hearsay evidence is sufficient to support an information request. *Magnet Coal, Inc*., 307 NLRB 444 fn. 3 (1992), enfd. mem. 8

[27] Saint Hilare's October 19, 2007, February 14 and April 10, 2008 communications to Jasinski on this issue fail to state why the Union is seeking this information and are not sufficient to demonstrate its relevance.

[28] The failure to respond to this updated request is not alleged in the complaint.

F.3d 71 (D.C. Cir. 1993).

The information requested is clearly relevant to the Union's concerns, as bargaining representative, of the nature and extent of the use of workers outside the unit who are being used to supplant the unit work force. *Lenox Hill Hospital*, 327 NLRB 1065, 1098-1069 (1999); *United Graphics*, 281 NLRB 463, 465 (1986). Information concerning the identity of such workers, their classifications, wages and the length of time employed at the facility are relevant to determine what Respondent was willing to pay for temporary employees to perform the same work as that performed by unit employees. See *Globe Stores*, 227 NLRB 1251, 1253-1254 (1977) (names, rates of pay, and store of employment of group managers performing the same tasks as rank-and-file employees). Similarly information regarding the names of the agencies used by Respondent is relevant as it provides an independent basis for the Union to conduct an investigation regarding the extent to which unit work is being displaced. Moreover, the relevancy of such information would have been apparent to the Respondent, and I note that Respondent has never contended otherwise.

The record establishes that Respondent repeatedly told the Union that no agency employees were being used at Palisade. General Counsel does not contest this assertion but argues that the evidence establishes that such denials were false. The evidence relied upon by the General Counsel in support of this contention consists solely of the anecdotal reports received by the Union from employees.

In disagreement with the General Counsel, I find that the second-and third-hand hearsay reports received by the Union, without corroboration, are too insubstantial to form any sort of basis upon which I might conclude that the facility used agency employees during the period encompassed by the Union's information request or during the time they were bargaining in 2007-2008.

Thus, it is not contested that while the parties were bargaining in 2007-2008 Respondent told the Union that no agency employees were being used, and there is insufficient probative evidence to establish to the contrary. Accordingly, I cannot conclude that that the Respondent provided false information to the Union or otherwise unlawfully failed and refused to provide information to the Union regarding agency usage, as alleged in the complaint.[29]

Accordingly, for the reasons set forth above, I find that Respondent has failed and refused or unlawfully delayed in providing information, as alleged in the complaint, as follows: documents showing the number of overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007; the names of no-frills employees; copies of employee work schedules; OSHA injury and illness reports for 2005, 2006 and 2007 and the per-employee monthly premium cost for employer-funded single health insurance. In this manner, Respondent has violated Section 8(a)(1) and (5) of the Act.[30]

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[29] I note that while the General Counsel has maintained that the Medicaid cost reports and work schedules contain information regarding agency usage, no attempt was made to utilize any of these documents, which had been provided to the Union by the Respondent prior to the hearing and entered into evidence in this matter, to question witnesses on this issue or to otherwise adduce probative independent evidence of agency usage.

[30] In his post-hearing brief, Counsel for the General Counsel asserts, for the first time, that Respondent unlawfully delayed in furnishing the Union with copies of certain contracts which had been entered into by the parties. While a request for these documents was included in Saint Hilare's October 19, 2007 letter, any alleged failure or delay in providing such documents to the

Continued

B. The Alleged Unilateral Discontinuance of Pension Fund Contributions

The complaint, as amended at the hearing, alleges that since on or about February 1, 2007, the Employer unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union. This allegation is based upon an amended charge, filed on April 9, 2009, which amended an earlier charge filed in December 2007. At the hearing, Respondent answered the amended complaint, denying the material allegations and asserting certain affirmative defenses. In particular, Respondent argued that the allegations of the amended complaint were not supported by the evidence and that the amendment was outside the scope of the complaint. Respondent further argues that the Union lacks standing to bring such a claim and that any dispute over this issue should have been resolved through the grievance and arbitration procedure. Respondent has additionally argued that the allegations of the amendment are barred by Section 10(b) of the Act.

1. Analysis

a. The Union has Standing to File the Charge

Respondent argues that only the Fund, and not the Union, has standing to raise the allegations of the amended charge. In support of this contention, Respondent maintains that the Fund and the Union are separate and distinct entities and, moreover, that the Union does not represent the Fund.

In disagreement with Respondent, I find that it is well-settled that the Union has so-called "standing" to raise this claim. I note that the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated. This is reflected in Rule 102.9 of the Board's Rules and Regulations and Statements of Procedure which provides, inter alia, as follows:

> Who may file . . . a charge that any person has engaged in and/or is engaging in any unfair labor practice affecting commerce may be filed by any person . . .

Moreover, in *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 17-18 (1943), the Supreme Court addressed the issue as follows:

> The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings senator Wagner, sponsor of the bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

Union was not alleged in the complaint. Nor was any such allegation brought forward by the General Counsel at any time during the hearing. Accordingly, I find that the matter was not fully litigated and decline to address it further. See *New Surfside Nursing Home*, supra at 1146, fn. 1. In any event, the remedy for such an allegation would be duplicative of what has already been recommended.

The Board has since adopted this ruling in *Bagley Products*, 208 NLRB 20, 21 (1973) and has also specifically affirmed that any person can file an unfair labor practice charge. See *Utility Workers Union of America (Ohio Power Co.)*, 203 NLRB 230 (1973).

b. The Section 10(b) Issue

Section 10(b) of the Act provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." Section 10(b) is an affirmative defense that, if not timely raised, is waived. *Public Service Co*., 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833, 833 fn.1(1993) enf. denied 39 F,3d106 (6th Cir. 1994)(defense waived when not raised in the answer or litigated at trial, even though raised in the brief to the judge). At the hearing, Respondent did not raise Section 10(b) as a defense to the allegations of the amended complaint; however, its initial answer asserts Section 10(b) generally as an affirmative defense. I note that the General Counsel has not advanced the argument that the Section 10(b) defense was not timely raised, and I find that Respondent's initial answer is sufficient to place the issue into contention.[31]

The General Counsel argues that the amendment is not time-barred because the allegations of the amended charge are "closely related" to the allegations of the earlier charge in Case No. 22-CA-28154 as they relate to mandatory subjects that were the subject of ongoing contract negotiations. General Counsel further contends that the Section 10(b) period did not start to run until February 9, 2009, when the Fund conducted an investigation into whether Healthcare and Sunshine had contracts with the Union. General Counsel maintains that the Union did not have either actual or constructive notice of the delinquencies prior to that time and that the Respondent has not met its burden of showing otherwise.

I do not agree with the General Counsel's contention that the amendment is timely because it is "closely related" to the original timely-filed charge. The applicable principles are set forth in *Redd-I, Inc*., 290 NLRB 1115 (1988):

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

[31] In addition, I note that the Section 10(b) defense was timely raised at the hearing in *Castle Hill*, and that the parties generally have agreed to rely upon that record in this proceeding.

Nevertheless, for the following reasons, I find that the amendment to the charge is timely filed. The Section 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *See Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005); *see also Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001) (finding that the 6-month period provided by Section 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice). "A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Ohio & Vicinity Reg'l Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001)) (applying Section 10(b) where a charging party was found to have been "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred."); see also *St. Barnabas Medical Center*, 343 N.L.R.B. 1125, 1127 (2004) (finding that knowledge is imputed when a party first has "knowledge of the facts necessary to support a ripe unfair labor practice."). If a party "'ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]' and 'whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.'" *See Miramar Hotel Corp*., 336 NLRB 1203, 1252 (2001) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); see also *Moeller Bros. Body Shop, Inc*., 306 NLRB 191 (1992) (holding that the "Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance."); *Mathews-Carlsen Body Works*, 325 NLRB 661, 662 (1998) (finding that had the Union exercised reasonable diligence, the Union would have become aware that Respondent had not made fringe benefit payments on behalf of a majority of the employees); *but see R.R.R. Restaurant*, 314 NLRB 1267, 1268 (1994) (finding the Union had no knowledge of the repudiation of benefits where the employer consistently made late payments.). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense. *See Dedicated Services*., 352 NLRB 753, 759 (2008).

The Board has, in various circumstances, held that knowledge must be imputed directly to a union, and not to third parties, in order for the union to have constructive knowledge of an unfair labor practice. See *Dedicated Services*, supra (and cases cited therein). Moreover, in situations involving unions and benefit trust funds, it is well-settled that the law recognizes that labor organizations, and employers for that matter, are not presumed to be affiliated with multiemployer benefit funds, or to be anything but separate and distinct entities. *NLRB v. Amax Coal Co*., 453 U.S. 322 (1981); *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), affd. 660 F.2d 406, 411 (9th Cir. 1981). The activities of such a fund will be binding on a labor organization only upon a specific showing of agency responsibility. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). Here, Respondent has adduced no such evidence and, to the contrary, has argued that these entities are unrelated. Overall, then, the Union, and not the Fund, must have had knowledge of the wrongdoing in order for the Section 10(b) period to begin.

That being said, I do not agree with the General Counsel that the Union was not in a position to know about the delinquencies in pension contributions prior to the February 2009 conference call. I find that the record here shows that the Union had sufficient facts at an earlier occasion to warrant the exercise of due diligence in this matter.

In particular, I find that this occurred in October 2008, when Blount wrote to Healthcare and Sunshine returning checks for a period from August 2003 through January 2007 and sent a copy of this letter to Union president Silva. In my view, the apparent failure of the employer to remit contributions after January 2007 was sufficient notice to trigger the Union's obligation to inquire as to

why there were no contributions received after that date.[32] While it can be argued that there was no "clear and unequivocal" evidence of wrongdoing at this point, the Union was put on notice of facts that reasonably would have engendered suspicion that an unfair labor practice had occurred and a simple inquiry would have revealed that the employer had ceased making payments, as was the case after the Union and the Fund held their conference call. *Ohio & Vicinity Reg'l Council of Carpenters, supra; St. Barnabas Medical Center, supra; Mathews-Carlsen Body Works*, supra. I note that Respondent has failed to adduce evidence of any reporting requirement or any other basis for me to conclude that actual or constructive knowledge had or should have occurred on a prior occasion.

Respondent points to the November 2006 e-mail exchange between Union representative Alcoff and Fund collections manager Salm regarding the relationship between the Omni facilities and Healthcare and Sunshine. From these communications it is apparent that the Union was aware that the Fund had failed to deposit the remittances sent by Healthcare and Sunshine. From the evidence, however, it is also apparent that at that time Healthcare and Sunshine were continuing to make appropriate contributions. Thus, at the time these e-mails were exchanged there was no extant unfair labor practice. Moreover, there is no basis for me to impute to the Union constructive knowledge of any future failure to remit contributions to the Fund.

Accordingly, based upon the record evidence as adduced by the parties, and bearing in mind that it is incumbent upon Respondent to meet its burden of proof in asserting this affirmative defense, I find that it was not until October 10, 2008, the date of Blount's letter, that the Union had sufficient facts at its disposal to ascertain that the Employer had failed to make contributions for a significant component of the bargaining unit.

Inasmuch as, by that time, the 2002 MOA had expired, a timely charge had to be filed and served not more than six months after the Union received actual or constructive notice of the unfair labor practice. See *Chemung Contracting Corporation*, 291 NLRB 773 (1988); see also *Park Inn Home for Adults*, 293 NLRB 1082, 1083 (1989). Thus, here the Union was required to file and serve its charge no later than six months after October 10, 2008, the date on which it should have known of the Employer's alleged wrongdoing. See generally *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). (Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.)

The Union filed its amended charge on April 9, 2009. The record demonstrates that it was sent to the Respondent and its counsel of record by the regional office on April 10, the following day. In accordance with Sec. 102.113 of the Board's Rules and Regulations, the date of service is the day on which the charge is deposited in the mail. See *Sioux Quality Packers*, 228 NLRB 1034, 1037 (1977); *Heartshare Human Services*, 339 NLRB 842, 847 (2003). Thus, the amendment to the charge was filed and served within the six month period after the Union received constructive notice

[32] I additionally note that Blount specifically noted that most of the checks were more than six months old, yet another indication that timely payments were not being made. In addition, for the foregoing reasons, I do not credit Blount's testimony that the Fund was unaware that the Healthcare and Sunshine had ceased making contributions to the Fund until February 2009.

of the unfair labor practice, albeit just barely.[33] Accordingly, I find that the Union's charge was filed and served in accordance with the provisions of Section 10(b) of the Act.[34]

As noted above, the amended charge alleges a failure to remit pension contributions dating from July 2007. The amended complaint, however, alleges that the failure to remit such contributions dates back to February 2007. Here, based upon the principles of *Redd-I*, supra, I find that the variance between the charge and the allegations of the complaint are not time-barred. The charge and the complaint involve the same theory of violation of the Act, sequence of events and defenses interposed by Respondent. In addition, the timing of the violation was a matter fully litigated at the hearing. See *Concourse Nursing Home*, supra at 694 fn. 13.

c. The Deferral Issue

At the hearing, Respondent's counsel asserted that "this is a classic case of the issue [that] should have been resolved through the grievance and arbitration procedure in this matter so if anything, the allegations of the [failure to make Fund] contributions would fall more within the confines of the collective bargaining agreement than through the auspices of the National Labor Relations Board . . ."[35] In its post-hearing brief, Respondent does not raise the issue of deferral as a separate defense, but asserts that inasmuch as the Union never filed a grievance over the Employer's alleged failure to remit contributions, it lacks standing to bring such a claim now. Respondent has provided no legal support in support of such contentions.

Deferral is an affirmative defense that can be waived if not raised in a timely fashion. To be timely raised, such a defense must be raised either in the answer or at the hearing. *15th Avenue Iron Works*, 301 NLRB 878, 879 fn. 12 (1991) enfd. 964 F.2d 1336 (2d Cir. 1992). . Here, Respondent raised this defense in its answer to the amended complaint at hearing; thus notwithstanding the fact that the issue was not directly addressed in Respondent's post-hearing brief, I conclude that the issue has been timely raised.

As discussed above, I have found that the Union did not have constructive knowledge of the failure to make all required Fund contributions until October 2008. By that time the parties' collective bargaining agreement had been expired for well over one year.[36]

In disagreement with Respondent, I do not find deferral to be an appropriate disposition of

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[33] See *MacDonald's Industrial Products*, 281 NLRB 577 (1986) (limitations period begins to run on the date after the alleged unfair labor practice occurs and does not include the day of the alleged unfair labor practice).

[34] Section 102.14 of the Board's Rules and Regulations provides that the charging party shall be responsible for the timely and proper service of the charge. However, the Board and the courts historically have held that service by the Board's regional office is sufficient, as long as it is timely. See *T.L.B. Plastics Corp*., 266 NLRB 331, fn. 1 (1983) and cases cited therein.

[35] To the extent that the contentions of Respondent's counsel, as raised at the hearing, may be construed as an argument that its alleged failure to make Fund contribution constitutes, at most, a breach of contract, and not an unfair labor practice, such an argument has been consistently rejected by the Board. *Sevens & Associates Construction Co*., 307 NLRB 1403, 1403 (1992)(and cases cited therein).

[36] In this regard, I note that Respondent has not specifically asserted a willingness to proceed to arbitration over this issue, and merely argues that the Union failed to file a grievance over the matter at any time during the term of the 2002 MOA or at any point thereafter.

these allegations. In *Laborers Health and Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 484 U.S. 539 (1988), the Court held that the Board has exclusive jurisdiction over claims that an employer has unlawfully failed to make contributions into a benefit fund after expiration of the collective-bargaining agreement. While Respondent's failure to make Fund contributions began during the term of the 2002 MOA, it continued past the expiration date of that agreement and in fact most of the alleged failures to remit Fund contributions occurred post-expiration. As the Board has held, such delinquencies are not susceptible to prospective arbitration. *Indiana & Michigan Electric Co.,* 284 NLRB 53, 60 (1987)(quoting *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977)(a party's presumptive contractual duty to arbitrate grievances about post-expiration events or conduct extends only to rights that "arise under" the contract because they are "capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires.") Here, "[e]ven though the Respondent's failure to make timely fund payments has been a continuing problem that began during the term of the contract, the failure to make fund payments for months since that contract expired is not presumptively arbitrable under the rationale of *Indiana & Michigan*. This so because the Union's right to payment for those particular months did not accrue or vest until after the contract expired." *15th Avenue Iron Works*, supra at 879. Accordingly, as the Board has explained, even under a properly raised request for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), only pre-expiration delinquencies which had not yet been addressed by arbitral awards could be addressed by prospective arbitration. In the event the Board would be required to resolve the issue of post-expiration delinquencies, as is the case here, it would be improper to defer the pre-expiration delinquencies, as the Board will not defer only a portion of intertwined issues in unfair labor practice proceedings. *15th Avenue Iron Works*, supra at 879 (citing *Sheet Metal Workers Local 17(George Koch Sons)*, 199 NLRB 166, 168 (1972)).[37] Further, in this case there are other outstanding issues, such as Respondent's failure to provide necessary and relevant information, which generally are not deferrable under *Collyer* and its progeny. See e.g. *Shaw's Supermarkets*, 339 NLRB 871, 871 (2003); *Medco Health Solutions of Spokane, Inc*., 352 NLRB 640 (2008). Moreover, piecemeal deferral is disfavored by Board policy. *15th Avenue Iron Works*, supra. Accordingly, I find that Respondent's argument for deferral is misplaced.

d. The Unilateral Cessation of Pension Fund Contributions

Having found that the charge is timely filed and served and the allegations of the amendment to the complaint are not barred by the applicable statute of limitations or subject to deferral, I will now proceed to evaluate the evidence adduced in this matter. As noted above, Blount testified that the final checks from Healthcare and Sunshine were received in May 2007, and were remittances for the month of January 2007. Blount's testimony that contributions ceased after this time, was unrebutted by probative evidence.[38] There is no evidence that the Union was afforded notice or an opportunity to bargain over this issue at any relevant time. It is well-settled that terms and conditions of employment included in a collective-bargaining agreement such as contributions to union funds survive contract

[37] See also *Stevens & Associates*, supra, where the Board found that deferral under *Collyer* was not appropriate where the respondent did not claim that its refusal to make required fund contributions was privileged by any provision of the parties' collective bargaining agreement; thus there was no bona fide issue of contract interpretation.

[38] As noted above, to the extent Respondent can show that Healthcare and Sunshine resumed making Fund contributions on behalf of unit employees in 2008 and 2009, such proof would apply to the mitigation of Respondent's liability and is appropriately addressed in compliance proceedings.

expiration and cannot be altered without bargaining to impasse, the Union's loss of majority or a waiver. *Concourse Nursing Home*, 328 NLRB 692, 702 (1999); *MBC Headwear, Inc*., 315 NLRB 424 fn. 3 (1994); *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1979). Further, the obligation to make payments due to a union's funds, includes the requirement that such payments be made on a timely and current basis. *Fallon-Williams, Inc*., 336 NLRB 602, 604-605, 611 (2001) (violation where employer failed to stay "current" in payments to union funds.)

Respondent argues that the evidence shows that since 2002 Palisade has always made the required contribution to the Fund and it was the Fund that refused to process the checks it received from August 2003 through January 2007. The Fund then returned the checks and refunded amounts already paid and told the Employer that they would not accept further contributions without a signed collective-bargaining agreement. Subsequently, by letter dated April 1, 2009, the Fund reversed course and found that the Employer would be required to make contributions because it claimed it had subsequently received a signed collective-bargaining agreement. As Respondent argues: "As such, the Union's allegations that the Employer *deliberately* failed to make the necessary contributions to the Fund are utterly absurd. . ." (emphasis in original).

Inasmuch as the record demonstrates that Healthcare and Sunshine ceased sending contributions for periods after January 2007, which is well over one year prior to the return of any checks, the logic of this argument is unclear. While the Fund cannot be said to be blameless in these circumstances, applicable law makes clear that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981*); Merrill & Ring, Inc*., 262 NLRB 362 (1982). Here, Respondent had a continuing obligation to make contributions to the Fund on behalf of its unit employees, notwithstanding any apparent failure on the part of the Fund to act with some measure of diligence in this matter.

Accordingly, I find that Respondent unlawfully ceased remitting pension contributions for bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint, as amended.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in or failing and refusing to provide certain information requested by the Union in its letters of October 19, 2007 and February 14, 2008, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses, certified nurses aides, orderlies, dishwashers, kitchen helpers, porters, maids, laundry workers and recreation aides employed at the Employer's Guttenberg, New Jersey facility

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing to remit contributions to the SEIU National Industry Pension Fund without consent of the Union or bargaining to a valid impasse over the issue.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that the Respondent supply the requested information, other than that which has already been provided to the Union. I further recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of benefits they suffered as a result of the Respondent's unilateral discontinuance of contributions to the SEIU National Industry Pension Fund (the Fund) in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful discontinuance of contributions to the Fund, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, supra. I further recommend that the Respondent be ordered to make all contributions the Fund as was required by the collective-bargaining agreement which was in existence on July 24, 2007, and which contributions the Respondent would have made but for the unlawful unilateral changes, including any additional amounts due to the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 6 (1979).[39]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

Respondent, Palisade Nursing Center, Guttenberg, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing to provide to the Union, or unnecessarily delaying in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees in the following unit:

> All full-time and regular part-time licensed practical nurses, certified nurses aides, orderlies, dishwashers, kitchen helpers, porters, maids, laundry workers and recreation aides employed at its Guttenberg, New Jersey facility.

(b) Failing and refusing to remit contributions owed to the SEIU National Industry Pension Fund (the Fund) before good-faith bargaining leads to a valid impasse or the Union agrees to the changes.

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[39] I leave for the compliance portion of these proceedings the appropriate computation of interest and additional sums due with respect to those Fund remittances which had been timely made by the Employer but not processed by the Fund.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of October 19, 2007 and February 14, 2008, that has been found necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the above-described unit, to the extent such information has not been previously provided to the Union.

(b) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(c) Make contributions, including any additional amounts due to the Fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which Respondent would have made but for its unlawful unilateral changes, as provided for in the remedy section of this decision.

(d) Make whole employees and former employees for any and all loss of benefits and expenses incurred as a result of Respondent's unlawful failure to make required contributions to the Fund, with interest, as provided for in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Guttenberg, New Jersey copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2007.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 16, 2010.

_____
Mindy E. Landow
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail to provide to the Union, or unnecessarily delay in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time licensed practical nurses, certified nurses aides, orderlies, dishwashers, kitchen helpers, porters, maids, laundry workers and recreation aides employed by Palisade Nursing Center at its facility located at Guttenberg, New Jersey

WE WILL NOT fail and refuse to remit contributions owed to the SEIU National Industry Pension Fund (the Pension Fund) before good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make employees and former employees whole for any and all loss of benefits or expenses incurred as a result of our unlawful discontinuance of contributions to the Pension Fund, with interest.

PALISADE NURSING CENTER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor
Newark, New Jersey 07102-3110
Hours: 8:30 a.m. to 5 p.m.
973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.